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**IN THE  
COURT OF APPEALS OF INDIANA**

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ALBERT LEE DIXON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A01-0603-PC-87
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable William H. Miller, Senior Judge  
Cause No. 82D03-0202-PC-1

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**November 2, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Albert Lee Dixon appeals the denial of his petition for post-conviction relief. We reverse and remand.

## **Issue**

We restate the issue as whether the post-conviction court erred in denying Dixon's petition.

## **Facts and Procedural History**

On April 17, 2000, Dixon was charged with dealing in cocaine, maintaining a common nuisance, and possession of marijuana. Dixon agreed to plead guilty in exchange for the dismissal of two pending cases. On November 9, 2000, the trial court held a guilty plea hearing at which Dixon was informed of the charges against him. Following his admission of guilt to each count, the following exchange occurred regarding the cocaine dealing charge:

BY MR. KISSINGER [Dixon's counsel]:       What the Judge is asking you is did you in fact possess that cocaine on that date at 1105 E. Powell and did you intend to distribute or sell or otherwise deal in that cocaine? That's what the charge is.

A       I'm pleading guilty to it but I don't know about the dealing.

BY THE COURT:   Sir, you understand I have to establish a factual basis for you to plead guilty. The question is did you have three grams in your possession?

BY MR. KISSINGER:   Albert, do you understand the question? Didn't we talk about this before?

A:     Yes.

BY MR. KISSINGER: Are you pleading guilty and did you in fact have that amount of cocaine in your possession on that date?

A: Yes.

BY MR. KISSINGER: Did you intend to deal or distribute that amount of cocaine?

A No. I didn't intend to distribute it but I had it.

Pet. Ex. 3 at 6-7. Subsequent to this exchange, the State introduced a factual basis that it alleged would have proven intent to deal had the case gone to trial. Dixon admitted that these facts were true. The trial court accepted Dixon's guilty plea and sentenced him to an executed term of twenty-five years.

On February 28, 2002, Dixon filed a petition for post-conviction relief, which, as ultimately amended, claimed that the trial court erred in accepting his guilty plea when he simultaneously maintained his innocence on the element of intent. On January 10, 2006, the post-conviction court denied his petition for relief. Dixon appeals.

### **Discussion and Decision**

Post-conviction proceedings are civil in nature, and the petitioner must establish his claims by a preponderance of the evidence. *Bahm v. State*, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003). As this is an appeal resulting from a negative judgment, Dixon must convince us that the "evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). We will only reverse "upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006). "In other words, the defendant must convince this Court that there is *no* way within

the law that the court below could have reached the decision it did.” *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). In our review, we accept the post-conviction court’s findings of fact unless clearly erroneous, but we do not have to give deference to the post-conviction court’s conclusions of law. *Bahm*, 789 N.E.2d at 57.

In *Ross v. State*, 456 N.E.2d 420 (Ind. 1983), the Indiana Supreme Court held that “a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error.” *Id.* at 423. Dixon contends that *Ross* effectively invalidates the trial court’s acceptance of his guilty plea, as his last statement before the court discussed the factual basis was, “I didn’t intend to distribute it but I had it.” Pet. Ex. 3 at 7.

The circumstances of Dixon’s guilty plea hearing are similar to those in *Wingham v. State*, 780 N.E.2d 1164 (Ind. Ct. App. 2002), on which Dixon relies. In *Wingham*, the defendant was charged with operating a motor vehicle while intoxicated and convicted based upon a guilty plea. The defendant petitioned for post-conviction relief, arguing that the trial court erroneously accepted his guilty plea without an adequate factual basis<sup>1</sup> and despite his contention of innocence to the element of intoxication. *Id.* at 1164. We considered the following excerpts from the guilty plea hearing:

Court: Had you been drinking alcoholic beverages before that time?

Wingham: Yes.

Court: And were you intoxicated?

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<sup>1</sup> The *Wingham* court ultimately disregarded this part of the claim. We assume that it did so because it found that the defendant’s protestation of innocence eliminated the need to address the sufficiency of the factual basis.

Wingham: No.

Court: Do you understand that one of the elements of this crime is that you were intoxicated at the time you were driving the vehicle and if you plead guilty today, you admit that you were intoxicated?

Wingham: Yes.

Court: Did the police officer offer you a breath test?

Wingham: Yes, sir.

Court: And were the results of the breath test .08?

Wingham: Yes, sir.

*Id.* at 1165. We noted that the trial court failed to take further action to establish Wingham's guilt and therefore determined that the acceptance of his guilty plea was reversible error. Wingham's denial of the necessary element of intoxication superseded his admission of the factual basis upon which the crime rested.

The State relies upon *Frazier v. State*, 490 N.E.2d 315 (Ind. 1986), in support of its argument that the trial court properly accepted Dixon's guilty plea. In *Frazier*, the defendant pled guilty to numerous charges resulting from a robbery. During the plea hearing, Frazier made inconsistent statements that resulted in a lengthy examination as to what Frazier was admitting. We deemed the plea valid, as the discrepancy involved a relatively insignificant fact and did not bear upon the question of innocence or guilt.<sup>2</sup>

The present case is different from *Frazier* in two important respects: Dixon's protestation of innocence directly bears upon the question of guilt or innocence, and the trial

court did not conduct a sufficient follow-up inquiry to establish Dixon's guilt. Dixon's admission to the factual basis upon which the State could prove his intent to distribute the cocaine does not overcome his denial as to a material element of the crime. A plea "should not be accepted from one who does not know ... whether or not he has committed the crime charged, for such would be entirely incompatible with the idea of an admission of guilt, and wholly inconsistent with the due administration of justice." *Harshman v. State*, 232 Ind. 618, 620-21, 115 N.E.2d 501, 502 (1953). It was, therefore, reversible error to accept Dixon's guilty plea. Accordingly, we reverse the post-conviction court's denial of Dixon's petition and remand for further proceedings.

Reversed and remanded.

BAKER, J., and VAIDIK, J., concur.

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<sup>2</sup> Frazier admitted to having taken an object from the intended victim; however, that object was not a necklace as the information alleged. *Frazier*, 490 N.E.2d at 316.